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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

HAROLD L. COLLINS,

Plaintiff,

vs.

**ENVER SOLAR INC., SMART
SOLAR MARKETING, MARC
GUYOU, and DOES 1 through 10,
inclusive, and each of them,**

Defendants

CASE NO.: 8:19-cv-00146-JLS

**NOTICE OF MOTION AND
MOTION TO ENTER DEFAULT
JUDGMENT**

Hearing Date: May 28, 2021

Hearing Time: 10:30am

Department 10A

Honorable Josephine L. Staton

NOTICE IS HEREBY GIVEN that the hearing for Plaintiff's Motion to Enter Default Judgment has been set for May 28, 2021 at 10:30 am before Honorable Josephine L. Staton in Court Room 10A, located at United States District Court, 411 W. Fourth St., Santa Ana, CA, 92701.

NOW COMES PLAINTIFF, by and through his attorney, Todd M. Friedman, to respectfully request that this honorable Court enter default judgment against Defendants. A default was previously entered by the Clerk of this Court on November 23, 2020. Plaintiff hereby requests that judgment be entered in the amount of thirty-nine thousand dollars (\$39,000) jointly and severally against

1 Defendants Enver Solar, Inc., Smart Solar Marketing, and Marcus Anthony
2 Gayou.¹

3 For the reasons set forth in the accompanying memorandum of points and
4 authorities, the attached declarations of Todd M. Friedman and Harold Collins,
5 and the pleadings, files, and other matters that may be presented at the hearing,
6 Plaintiff respectfully request the Court grant his Motion for Default Judgment and
7 enter Judgment.

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10 Respectfully submitted this 11th day of January, 2021.

11 By: s/Todd M. Friedman

12 TODD M. FRIEDMAN

13 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

14 Attorney for Plaintiff
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¹ Named as Marc Guyou in the Complaint.

Memorandum of Points and Authorities

Defendants Enver Solar Inc. (“Enver”), Smart Solar Marketing (“SSM”), and Marcus Anthony Gayou (“Gayou”)² have been defaulted by the Court such that Default Judgment may now be taken against them. Plaintiff Harold L. Collins (“Plaintiff”) received six calls in violation of the National Do-Not-Call Registry provisions of the Telephone Consumer Protection Act, 47 U.S.C. §227(c) (“TCPA”) and was illegally recorded sixtimes without his consent in violation of the California Invasion of Privacy Act, Cal. Pen. C. §632.7 (“CIPA”). Accordingly, Plaintiff now seeks statutory damages jointly and severally against Defendants for these violations in the amount of \$39,000.

I. Procedural Background

Plaintiff filed the Complaint on January 25, 2019. Dkt. 1. Defendant Gayou was personally served on February 2, 2019 but never responded to the lawsuit. Dkt. 13. Defendants Enver and SSM retained attorneys and answered the Complaint on May 23, 2019. Dkt. 16. On January 13, 2020, Defendants Enver and SSM’s attorneys moved to withdraw from the case, which was granted on March 17, 2020. Dkts. 23-24. On June 11, 2020, default was taken against Defendant Gayou. Dkt. 26. Plaintiff thereafter moved to dismiss putative Class Claims without prejudice due to the insolvency of Defendants and for default against Defendants Enver and SSM. Dkts. 27-28. The Court dismissed the Class Claims without prejudice and issued an order to show cause to Defendants Enver and SSM. Dkt. 32. Defendants Enver and SSM did not respond to the Order to Show Cause and default was taken by the clerk on November 23, 2020. Dkt. 33. Plaintiff now moves for default judgment against all three defaulted Defendants.

II. Factual Background

“The general rule of law is that upon default the factual allegations of the

² Named under an alias of Marc Guyou in the Complaint, but permissibly amendable at the time of judgment as set forth below.

1 complaint, except those relating to the amount of damages, will be taken as true.”
2 *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir.1977). While Plaintiff
3 additionally submits a declaration further substantiating the factual allegations,
4 Plaintiff begins by turning to those factual allegations.

5 Beginning in or around March 2, 2018, Defendants contacted Plaintiff in an
6 attempt to solicit Plaintiff to purchase Defendants’ services.³ Complaint, Dkt. 1,
7 at ¶ 12 (“Complaint”). The calls at issue were made to Plaintiff’s wireless home
8 telephone which had been registered on the National Do-Not-Call Registry since
9 October 2004 and represent multiple calls for the purposes of solicitation made
10 within a year made to a number registered on the DNC Registry, thus satisfying
11 the elements of 47 U.S.C. §227(c).⁴ Declaration of Harold L. Collins (“Collins
12 Decl.”) at ¶¶ 3-4, 10-13. Defendants called Plaintiff six times in a row. *Id.*;
13 Complaint at ¶ 13. Plaintiff’s telephone number had been registered on the
14 National Do-Not-Call List since August 9, 2012—at least six months prior to the
15 call. Complaint at ¶ 16; Collins Decl. at ¶ 3. Defendants did not have Plaintiff’s
16 prior express consent to call him. Complaint at ¶ 20; Collins Decl. at ¶ 14.
17 Further, Defendants recorded Plaintiff but did not inform Plaintiff that they were
18 recording the call and did not obtain his actual or constructive consent to be
19 recorded. Complaint at ¶¶ 24-26; Collins Decl. at ¶ 13. By doing so, Defendants
20 violated the Do-Not-Call Provisions of the TCPA as well as CIPA. Complaint at
21 ¶¶ 50-57; Collins Decl. at ¶ 15. Plaintiff seeks statutory damages of \$1,500 per
22 call in violation of the TCPA and \$5,000 per call in violation of CIPA.

23 **III. Legal Argument**

24 Given the facts are uncontested, the Court should enter default judgment in
25 favor of Plaintiff against Defendants. After entry of a default, the Court may

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27 ³ Defendant Gayou is the responsible managing officer for Enver and Smart Solar
and thus responsible for the acts of the companies whom he oversees. *Id.* at ¶ 9.

28 ⁴ Plaintiff does not seek judgment for and dismisses his first two causes of action
under 47 U.S.C. §227(b).

1 enter a default judgment. *Coach, Inc. v. Diana Fashion*, 2011 WL 6182332, at *1
2 (N.D. Cal. Dec. 13, 2011) (citing Fed.R.Civ.P. 55(b)(2)). Its decision whether to
3 do so, while “discretionary,” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th
4 Cir.1980), is guided by several factors. As a preliminary matter, the Court must
5 “assess the adequacy of the service of process on the party against whom default
6 judgment is requested.” *Bd. of Trs. of the N. Cal. Sheet Metal Workers v.*
7 *Peters*, No. 00–0395 VRW, 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan.
8 2, 2001).

9 If the Court determines that service was sufficient, it should consider
10 whether the following factors support the entry of default judgment: (1) the
11 possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive
12 claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the
13 action; (5) the possibility of a dispute concerning material facts; (6) whether the
14 default was due to excusable neglect; and (7) the strong policy underlying the
15 Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v.*
16 *McCool*, 782 F.2d 1470, 1471–72 (9th Cir.1986). “The general rule of law is that
17 upon default the factual allegations of the complaint, except those relating to the
18 amount of damages, will be taken as true.” *Geddes v. United Fin. Group*, 559
19 F.2d 557, 560 (9th Cir.1977).

20 All of these factors weigh in favor of entering default judgment as laid
21 forth below.

22 **A. Service of Process Was Adequate and Judgment May Be Entered**
23 **Against Marcus Anthony Gayou Named As Marc Guyou In The**
24 **Complaint**

25 All Defendants were served personally as required under California law.
26 Dkts. 12-14. Accordingly, there is no issue regarding the adequacy of service.
27 Further, Plaintiff may appropriately request and the Court may order that Marcus
28 Anthony Gayou be named in the judgment in place of his alias Marc Guyou

1 In *Grannis v. Ordean*, 234 U.S. 385, 391 (1914), service of summons in an
2 action for partition of real property was completed by mailing and publication, in
3 full compliance with state statutes, but, one defendant's surname was misspelled,
4 presenting the issue of whether service in this manner was consistent with due
5 process and could bind the defendant to the judgment. In considering the issue,
6 the Court stated:

7 The “due process of law” clause, however, does not
8 impose an unattainable standard of accuracy. If a
9 defendant within the jurisdiction is served personally
10 with process in which his name is misspelled, he cannot
11 safely ignore it on account of the misnomer. The rule,
12 established by an abundant weight of authority, is, that
13 if a person is sued by a wrong name, and he fails to
appear and plead the misnomer in abatement, the
judgment binds him.

14 *Id.* at 394-95. Here, Defendant Gayou was personally served at his residence
15 with process as provided for under Cal. C. Civ. Proc. § 416.90. Dkt. 13. Further,
16 in reviewing the Complaint he was served with, Defendant Gayou would have
17 readily ascertained that the Marc Guyou named in the lawsuit was him.⁵

18 Defendant Gayou was listed on the Contractor State Licensing Board website as
19 the Responsible Managing Officer for Defendant Enver at the relevant time and
20 as set forth in the Complaint. Collins Decl. at ¶ 6 and Complaint at ¶ 9. Despite
21 being served on February 2, 2019 and receiving numerous court filings and
22 notices, including of his default, Defendant Gayou has chosen not to respond to
23 the Complaint. Amending his alias of Marc Guyou to Marcus Anthony Gayou
24 for purposes of judgment is accordingly appropriate.

25 Further, amending a misspelled party’s name on a judgment is viewed as a
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28 ⁵ Further, Defendant Gayou actually operates his own construction company
using the alias spelling, “Guyou Construction.” Collins Decl. at ¶ 8.

1 permissible non-substantive change in the Ninth Circuit.⁶ In *Catz v. Chalker*, 566
2 F.3d 839, 841 (9th Cir.2009), the Ninth Circuit indicated Rule 60(a) can be
3 applied to correct a misspelled party's name on a judgment because it is
4 considered a “clerical mistake.” *See also Harman v. Harper*, 7 F.3d 1455, 1457
5 (9th Cir.1993) (“The basic distinction between ‘clerical mistakes’ and mistakes
6 that cannot be corrected pursuant to Rule 60(a) is that the former consist of
7 ‘blunders in execution’ whereas the latter consist of instances where the court
8 changes its mind”). A mistake need not have been committed by the clerk or the
9 court, and Rule 60(a) is available even to correct mistakes by the parties. *Icho v.*
10 *PacketSwitch.com, Inc.*, 2010 WL 503039, at *5–6 (N.D. Cal. Feb. 5, 2010), *aff’d*
11 *sub nom. Icho v. Hammer*, 434 F. App’x 588 (9th Cir. 2011) (citing *Warner v.*
12 *Bay St. Louis*, F.2d 1211, 1212 (5th Cir. 1976) (mistakes correctable by Rule
13 60(a) are “not necessarily made by the clerk”); *Pattiz v. Schwartz*, 386 F.2d 300,
14 303 (8th Cir. 1968) (mistakes by parties correctable by Rule 60(a)). The Rule
15 “allows courts to modify their judgment in order to insure that the record reflects
16 the actual intention of the court and the parties.” *Id.* (citing *Matter of West Texas*
17 *Marketing Corp.*, 12 F.3d 497, 504 (5th Cir.1994)).

18 Accordingly, the Court may appropriately name and enter judgment against
19 Marcus Anthony Gayou in place of his alias Marc Guyou.

20 **B. Plaintiff Will Suffer Prejudice If Default Judgment Is Not Entered**

21 For the reasons set forth above and below, Plaintiff has suffered a
22 cognizable legal harm from the invasion of his privacy as codified by the
23 California and United States Legislatures in the CIPA and TCPA. If Default
24 Judgment is not entered, Plaintiff will suffer prejudice by being deprived the right
25 to pursue those claims against Defendants who have chosen to flaunt the law.

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28 ⁶ Usually considered under Fed. R. Civ. P. 60(a) for amending a judgment after receiving it, but the Court may also consider it in applying for the judgment in the first place, rather than waiting for a second motion to correct it after.

C. Plaintiff's Claims Have Merit

Plaintiff has adequately alleged claims under the TCPA and CIPA and further supported those claims with the declaration of Plaintiff.

Section 227(c)(5) establishes a private right of action in state court for a person who has received more than one telephone call within any twelve-month period by or on behalf of the same entity in violation of these regulations. *Kazemi v. Payless Shoesource Inc.*, 2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010). A person may bring an action under section 227(c)(5) to enjoin the violation and to receive the greater of his or her actual monetary losses or up to \$500 per violation. *Id.* For willful and knowing violations, the court has discretion to treble the award amount. *Id.*

The six calls at issue were made to Plaintiff's wireless home telephone which had been registered on the National Do-Not-Call Registry since October 2004 and represent multiple calls for the purposes of solicitation made within a year made to a number registered on the DNC Registry, thus satisfying the elements of 47 U.S.C. §227(c).⁷ Collins Decl. at ¶¶ 3-4, 10-13; Complaint at ¶¶ 12-13, 16, 20. Plaintiff's registration on the National-Do-Not Call Registry for over ten years prior to the call and the repetitive and intentionally harassing nature of the calls makes it clear Defendants' violations were willful and wanton and not just negligent. Collins Decl. at ¶ 15. Defendant Gayou has been the RMO for at least three other companies that made similar illegal calls in the past. *Id.* at ¶ 9. Accordingly, Plaintiff has demonstrated his TCPA claim has merits for six violations of (c)(5).

Cal. Pen. C. § 632.7 makes it illegal to receive and record a communication between a cordless telephone and any other phone without the consent of all

⁷ Plaintiff does not seek judgment and dismisses his first two causes of action under 47 U.S.C. §227(b).

1 parties to the call. Cal. Pen. C. § 632.7; *Coulter v. Bank of America*, 28
2 Cal.App.4th 923, 935 (1994). Each illegal recordation is subject to \$5,000 in
3 statutory damages. *Id.*; Cal. Pen. C. § 637.2. Defendants recorded the telephone
4 calls to Plaintiff's wireless telephone without informing him or obtaining his
5 consent, thus satisfying the elements of Cal. Pen. C. § 632.7. Collins Decl. at ¶
6 13; Complaint at ¶¶ 24-26.

7 As one additional note on joint and several liability, Plaintiff alleged that
8 all Defendants were involved in placing the calls at issue and making the
9 recordings at issue. Complaint at ¶¶ 12-27. Further, Defendant Gayou was
10 responsible pursuant to Cal. Bus. & Prof. C. §§ 7965(c)(3), 7065.1(c), 7068, and
11 7068.1 as responsible managing officer for the actions of Defendant Enver—in
12 which he was both an officer and had to hold at least a 20% equity share. Collins
13 Decl. at ¶¶ 6-8. Where a statute intended to protect and benefit the public welfare
14 is violated by a corporation, the corporate officers and managers having control
15 over and the ability to ensure compliance with the law are personally liable for
16 the violations. *United States v. Park*, 421 U.S. 658 (1975); *People v. Wilmshurst*,
17 68 Cal.App.4th 1332 (1999); *People v. Toomey*, 157 Cal.App.3d 1 (1984); and
18 *People v. Conway*, 42 Cal.App.3d 875 (1974). The CIPA and TCPA are statutes
19 specifically enacted to protect the public welfare of citizens of the United States
20 and California by protecting their right to privacy. Accordingly, imposing
21 liability against Defendant Gayou as the responsible managing officer is
22 appropriate.

23 Both Plaintiff's CIPA and TCPA claims have merit and liability may be
24 imposed jointly and severally against all Defendants.

25 **D. The Sufficiency of the Complaint**

26 Plaintiff's Complaint adequately pleads the nature of the claims, the factual
27 allegations supporting those claims, and the statutory damages per violation at
28 issue as set forth above. Accordingly, the Complaint is sufficient.

1 **E. The Sum of Money At Stake In The Action**

2 Plaintiff seeks only the statutory damages he is owed, which is \$39,000
3 composed of 6 violations of the TCPA at \$1,500 per violation and 6 violations of
4 CIPA valued at \$5,000 per violation. The sum is not excessive and is expressly
5 authorized by the statutes.

6 **F. The Possibility Of A Dispute Concerning Material Facts**

7 Plaintiff has direct knowledge of the calls at issue, his registration on the
8 do-not-call registry, and Defendants explicitly told Defendants that it illegally
9 recorded the six calls after the fact. Accordingly, even in absence of default,
10 there can be no dispute concerning the material facts in this matter.

11 **G. The Default Is Not Due To Excusable Neglect**

12 Defendants Enver and SSM have chosen not to retain new counsel after
13 their attorneys withdrew in March 2020. Defendant Gayou has failed to respond
14 to the Complaint despite being served in February 2019 and receiving notices of
15 his default and other proceedings. There is no excusable neglect.

16 **H. This Matter Will Be Resolved On The Merits Through Default**
17 **Judgment**

18 Because Plaintiff had adequately supported his claims as set forth above,
19 resolution of this matter through default judgment will act as an adjudication on
20 the merits as favored within the Ninth Circuit.

21 **IV. Conclusion**

22 Defendants were properly served and had an opportunity to respond to
23 Plaintiff's allegations but have failed to do so. Plaintiff's complaint sought and
24 Plaintiff is thus entitled to \$1,500 statutory damages per call pursuant to 47
25 U.S.C. §227(c)(5), and \$5,000 per violation pursuant to Cal. Pen. C. § 637.2(a).
26 Plaintiff has submitted evidence through the Complaint, which is taken as true,
27 and his attached declaration and is thus entitled to judgment against Defendants
28 Enver Solar, Inc., Smart Solar Marketing, and Marcus Anthony Gayou in the
amount of thirty nine thousand dollars (\$39,000) for the six violations of Cal.

1 Pen. C. § 632.7 and six violations of provision (c) of the TCPA. Because all
2 Defendants participated and oversaw the calls at issue, joint and several liability
3 as to all Defendants is appropriate.
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6 Respectfully submitted this 11th day of January, 2021.

7 By: s/Todd M. Friedman
8 TODD M. FRIEDMAN
9 LAW OFFICES OF TODD M. FRIEDMAN, P.C.
10 Attorney for Plaintiff
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1 Filed electronically on this 11th Day of January, 2020, with:

2 United States District Court CM/ECF system

3
4 Notification sent electronically via the Court's ECF system to:

5 Honorable Judge Josephine L. Staton
6 United States District Court
7 Central District of California

8 And Mailed to:

9 Marc Guyou aka Marcus Anthony Gayou
10 27471 Fallbrook Ct
11 Corona, CA 92883

12 Smart Solar Marketing
13 c/o Corporate Service Company
14 2710 Gateway Oaks Dr., Suite 150N
15 Sacramento, CA 95833

16 Enver Solar Inc.
17 c/o Corporate Service Company
18 2710 Gateway Oaks Dr., Suite 150N
19 Sacramento, CA 95833

20 This 11th Day of January, 2020

21 s/Todd M. Friedman, Esq.
22 TODD M. FRIEDMAN
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